No. 81-31

IN THE

Supreme Court of the United States

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October Term, 1981

GRACE BRETHREN CHURCH and REVEREND DAVID L. HOCKING, etc., *et al.*,

Appellees,

vs.

STATE OF CALIFORNIA, *et al.*,

Appellants.

THE LUTHERAN CHURCH-MISSOURI SYNOD, etc., *et al.*,

Appellees,

vs.

STATE OF CALIFORNIA EMPLOYMENT DEVELOPMENT DEPARTMENT, *et al.*,

Appellants.

On Appeal from the United States District Court for the Central District of California.

MOTION TO AFFIRM.

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Appellants.

MOTION TO AFFIRM.

Appellees, The Lutheran Church-Missouri Synod ("the Synod") on behalf of its eighty-five member churches, St. John's Lutheran Church, and Vivadell Keiser (collectively, "the Lutheran appellees") respectfully move the Court for an order affirming the judgment entered in this action on April 6, 1981, by the United States District Court for the Central District of California. The grounds for this motion to affirm are that:

1. Any questions regarding the proper construction of the statutes in question have been rendered unsubstantial by the decision of the Court in *St. Martin Evangelical Lutheran Church v. South Dakota*, ... U.S. ..., 101 S.Ct. 2142 (1981); and

2. Appellant has specifically disclaimed any intention of bringing before the Court the question of statutory construction.

The decision of the District Court in favor of the Lutheran appellees on the issue of statutory interpretation therefore must be affirmed.

Insofar as the constitutional basis for the decision of the District Court is challenged by this appeal, these appellees join in the Motion to Affirm submitted by appellees Grace Brethren Church, *et al.* on August 3, 1981.

Constitutional Provisions and Statutes Involved.

The pertinent constitutional provisions and statutes are set forth correctly in the Jurisdictional Statement filed by the State of California.

Counterstatement of the Case.

The Synod is a non-profit membership corporation whose members are Lutheran congregations, a number of which operate primary or secondary schools. One such congregation is appellee St. John's Lutheran Church. Appellee Vivadell Keiser was a teacher at St. John's Lutheran Church when this litigation commenced.

The Lutheran appellees sought declaratory and injunctive relief against the application of the *California Unemployment Insurance Code* to schools operated, supervised and controlled by member congregations of the Synod. The Lutheran appellees sought to enjoin the collection of the tax as well as the collection of information used by the State in imposing the tax. The Lutheran appellees argued that the

schools operated by Synod members were exempt from the tax, not only on statutory grounds but also because the imposition of unemployment insurance coverage upon those schools contravened their rights under the First and Fourteenth Amendments to the United States Constitution.

The action brought by the Lutheran appellees was consolidated for trial with a similar action brought by the Grace Brethren Church, its pastor, the Christian Unified Schools of San Diego, the Redwood Christian Schools, and a number of individuals variously associated with the foregoing ("the Grace Brethren appellees"). Following trial of this matter, the District Court rendered findings of fact and conclusions of law in favor of plaintiffs in the consolidated cases.

The District Court found as to the Lutheran appellees that all of their schools were either without a separate legal existence from the churches by which they were operated ("Category I") or were operated as separate corporations by a church or association of churches ("Category II"). These two categories of schools, the Court concluded, were exempted from the unemployment tax scheme by the plain meaning of the statute under consideration. (Jurisdictional Statement, App. C, p. 49, App. E, p. 71.)

As to the schools operated by the Grace Brethren appellees, the District Court found that some of those schools fell into a third category. The so-called "Category III" schools are religious in purpose and orientation, but are not associated with any particular church or religious denomination. (Jurisdictional Statement, App. E, p. 71.) The Court concluded that the Category III schools were not exempted by virtue of the "plain meaning" of the California statute but held that to apply the statute to them would result in entanglement between Church and state forbidden by the First Amendment to the United States Constitution. (Jurisdictional Statement, App. B, pp. 45-46.)

The United States of America[1] and the State of California appealed directly to this Court[2] from the holding of the District Court that Federal Unemployment Tax Act section 3309[3] and *California Unemployment Insurance Code* section 634.5 were unconstitutional as interpreted and applied. Neither appellant challenged the judgment of the District Court insofar as it was based upon statutory grounds.[4]

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[1]The appeal by the United States of America has been docketed in this Court as Case No. 81-228. The Lutheran appellees were listed as appellees in the Notice of Appeal filed by the United States, but the United States apparently dropped the Lutheran appellees from the case when the Jurisdictional Statement was filed. Hence, the instant motion to affirm is directed only to the Jurisdictional Statement filed by the State of California.

[2]Pursuant to 28 U.S.C. §1252.

[3]26 U.S.C. §3309.

[4]See Argument §2 and note 5 *infra*.

ARGUMENT.

1. Any Issues Regarding the Proper Construction of the Statutes in Question Are Not Substantial.

Consideration of the statutory construction issues has been rendered unnecessary by the recent decision of the Court in *St. Martin Evangelical Lutheran Church v. South Dakota*, ... U.S. ...., 101 S.Ct. 2142 (1981). The questions concerning the interpretation of section 3309 of the Federal Unemployment Tax Act (and, effectively, *California Unemployment Insurance Code* section 634.5) were decided by the Court in that case. "This disposition renders the merits in the present case a decided issue and thus one no longer substantial in the jurisdictional sense." *Norton v. Mathews*, 427 U.S. 524, 530-31 (1976). Therefore, the decision of the District Court on the issues of the proper construction of the statutes in question must be affirmed.

2. Appellant Has Specifically Disclaimed Any Intention of Bringing Before the Court the Question of Statutory Construction.

In its Jurisdictional Statement, the State of California specified that

> Appellants appeal only from that portion of the judgment which finds impermissible and excessive entanglement with religion in the benefit eligibility determination process with respect to employees of religious schools . . . . [T]wo church group appellees (Christian Unified Schools of San Diego and Redwood Christian Schools) prevailed at the trial level only because of the District Court's favorable holding on this issue. (Jurisdictional Statement at pp. 11-12.)

The State continued: "Appellants have consistently agreed with the position of the church group appellees insofar as they sought declaratory relief on purely statutory

grounds. *The holding of the District Court is completely in accord with appellants' position.*" (Jurisdictional Statement at p. 12.) (Footnote omitted. Emphasis supplied.)

The appeal by the State of California is taken solely from the holding of the District Court that the Federal Unemployment Tax Act section 3309 and *California Unemployment Insurance Code* section 634.5 are unconstitutional as interpreted and applied with respect to the benefit eligibility determination process. That holding affects the result only as to two school groups in the Grace Brethren action. The District Court found that the schools operated by Synod members are exclusively Category I and Category II schools and thus exempted from payment of the tax by virtue of the plain meaning of the statute language. Inasmuch as the Court's holding in the Lutheran case was based upon the District Court's interpretation of the statutes under consideration rather than the holding on the issue of constitutionality, the instant appeal has no effect upon the decision of the District Court in the Lutheran case, a proposition that the United States of America has recognized.[5]

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[5]The United States chose not to appeal the District Court's construction of the statutes. In footnote 2 to his Jurisdictional Statement in Case No. 81-228, the Solicitor General states:

> Although this case was consolidated with *Lutheran Church-Missouri Synod v. California Employment Development Department*, No. CV 79-162 MRP, for decision below, only the instant case involves Category III schools. . . .

At footnote 5 he continues:

> We do not ask this Court to review the district court's conclusions concerning the applicability of the statutory exemptions to Category I and Category II schools. The decision that Category I schools are exempted from FUTA is clearly correct under *St. Martin Evangelical Lutheran Church v. South Dakota, supra*. After careful consideration of the relevant legislation, the Secretary of Labor has concluded that Congress intended to treat Category I and Category II schools alike, and thus does not wish to challenge the conclusion that Category II schools are also exempt under the statutory scheme. We accordingly do not ask this Court to review the *Lutheran Church* case, which involves only Category I and Category II schools. . . .

Therefore, the judgment of the District Court as to these appellees must be affirmed.

Respectfully submitted,

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